Attorney Incompetence: A Plea for Reform

By Irving R. Kaufman

OUR SYSTEM of justice has progressed well beyond archaic determinations of guilt or innocence based on whether the accused could withstand gruesome ordeals or defeat his accusers in the heat of battle. We no longer render a verdict after requiring a blindfolded defendant to reach before him and choose either a cross, the exemplar of innocence, or a hot coal, the sure indicater of guilt. Modern American courts are obligated to rely on careful scrutiny of the evidence to decide whether the defendant has committed a crime. Occasionally, however, the performance of today's attorneys makes one wonder whether a defendant might prefer the days of the cross and the coal.

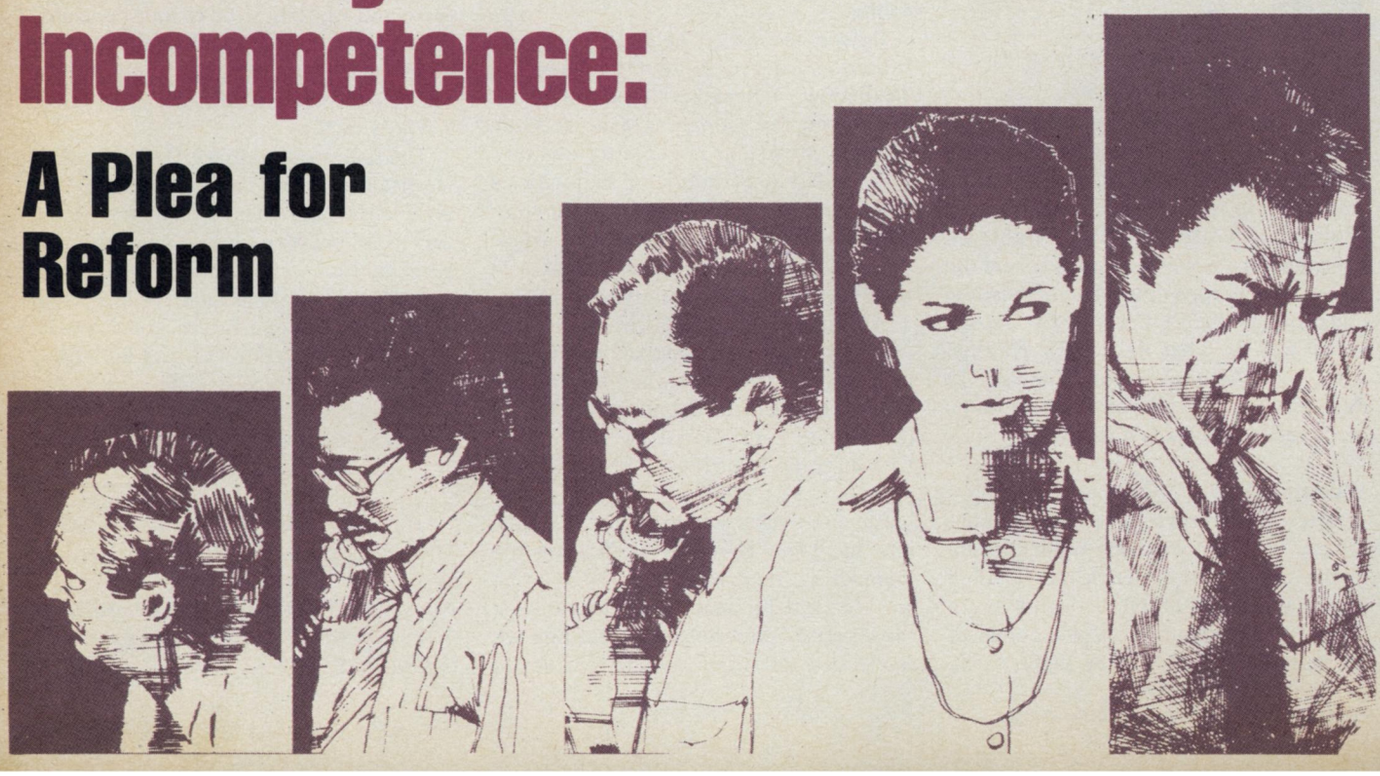
The presence of competent and effective counsel long has been recognized as a bedrock principle in our adversary system of justice. Attorneys for the parties are the principal fact gatherers and oral advocates. As a result, the success of courts in accurately adjudicating cases depends to a great extent on the competence of attorneys. The unfortunate reality, however, is that many litigants, and particularly indigent criminal defendants not represented by legal service organizations, enjoy little more than the mere physical presence of an attorney rather than his talents. Chief Justice Burger and other leading jurists have estimated that perhaps as many as 50 per cent of the attorneys who appear in court ill serve their clients' interests.

Extensive incompetence

In my 21 years as a judge on the United States Court of Appeals for the Second Circuit, preceded by 12 years as a district court judge, I have encountered countless instances of incompetent counsel. In one recent case it was alleged that a defendant's trial counsel refused to meet with the client and told her to pretend she was a senile old woman. He also failed to cross-examine key government witnesses concerning the most damaging aspects of their testimony despite the fact that their statements were largely inconsistent with the information they had provided to the grand jury.

Incompetence also is a recurring problem on appeal. In one case involving appeals by several defendants from their conviction for a drug-related offense, the lawyer for one appellant declined to file a brief and instead rested on a brief submitted for one of the coappellants. A cursory examination of the brief that was relied on revealed that it focused on the more substantial evidence of guilt implicating the appellant whose attorney did not submit a brief. In this instance a lazy lawyer rendered a grave disservice to his client. Claims of inadequate representation are being raised with increasing frequency.

As I reflect on problems posed by incompetent counsel, my experience has convinced me that collateral and appellate review of criminal convictions provide inadequate safeguards. While there are a number of protective measures trial judges can take to protect the rights of a criminal defendant represented by an incompetent attorney, the problem of incompetence among trial lawyers, and particularly among criminal defense practitioners, appears to be largely a result of problems in our system of training. I note by contrast that the federal government apparently recognizes the inability of recent law school graduates to step in and conduct criminal trials. The Department of Justice gives special courses instructing federal prosecutors in the art of preparing and examining witnesses. This training by no means as-



sures the competence of every assistant U.S. attorney, and indeed I have seen a number of government cases mishandled particularly when the assistant overreached to get a conviction knowing his tactics would be condemned by an appellate court. Because I am chiefly concerned in this article with the plight of inadequately represented defendants, I will focus on the difficulties that some members of the criminal defense bar may face.

Stopgap solutions cannot remedy these pressing problems; wide-ranging and innovative changes are necessary. Although I do not purport to know all the answers, the following suggestions may enable us to take a small step along the road toward a solution.

Remedies on appeal

Postconviction review alone is not likely to improve substantially the quality of legal representation. Appellate judges are presented with a cold record and do not have the benefit of witnessing the conduct of the trial counsel in action. Nor can reviewing courts fully glean from the still life of the appellate record an adequate understanding of trial counsel's knowledge of the law, his ability to analyze legal issues and plan trial strategies, and his capacity to conduct effective examination of witnesses.

Even when appellate courts discover sufficient evidence of incompetence, it remains difficult to determine an appropriate course of action. A reviewing court's only powerful weapon is the ability to reverse a conviction, but the threat of appellate sanctions at some remote date is unlikely to alter a lawyer's current performance and may be counterproductive. The incompetent attorney, in fact, may welcome a second trial in which the prosecution's case is weakened by the passage of time and the fading of witnesses' memories. Instead of relying on inadequate appellate sanctions, we should look for solutions in the trial courts.

How, then, can trial judges measure competency and what steps can they take to upgrade the quality of representation? Competency at trial is an elusive concept, and any remedies adopted must be flexible. Advocacy is an art, and attorneys must be allowed broad discretion in making strategic choices to aid their clients. Nonetheless, certain minimum duties may be imposed without interfering with the strategic discretion at the heart of the adversary system. A requirement that a lawyer perform the necessary investigation, research, and preparation in the pretrial phase, for example, could help solve many of the problems that culminate in inadequate trial representation. Conscientious performance of these duties will ensure the attorney's familiarity with the facts of his case. It is my experience that facts properly presented win cases, and slovenly handling of facts loses cases.

Competency at trial is an elusive concept, and the remedies judges adopt must be flexible. The art of advocacy entails making broad choices of strategy.

Trial judges are not without resources to determine whether defense lawyers have met these minimal obligations. Pretrial conferences, for example, might be used as a regular procedure for monitoring the performance of defense counsel in accordance with minimum duties. This would eliminate the need to depend on signals at trial from defendants or counsel to trigger judicial inquiries into competence. In the federal system the office of the magistrate also might provide an alternative supervisory device if trial judges are unable to assume this additional burden on their overcrowded schedules.

The Federal Magistrates Act authorizes a federal district judge to designate a magistrate to hear and rule on a number of pretrial criminal proceedings. Magistrates could be employed to make initial fact findings, subject to the judge's review, concerning the extent to which defense counsel has prepared his case and discharged his other duties. The magistrate's report could serve to trigger a more searching inquiry by the trial judge when it reveals evidence of misfeasance or inaction prejudicial to the interests of the defendant. The report also would augment the trial record and better enable an appellate court to adjudicate an ineffective assistance of counsel claim.

If evidence of incompetence is discovered after an inquiry by a magistrate or the trial judge in the pretrial stage, the judge would be in a position to take effective action. Judicial controls at this stage need not be coercive or drastic; they can consist of admonitions to do more work in preparation rather than orders that attorneys alter their fundamental strategies. The trial court also could contemplate offering corrective suggestions, preferably on the record and in the presence of opposing counsel. If counsel's misfeasance is more serious, the trial judge could contemplate informing the defendant of this problem and of his right to seek the services of another lawyer. Or the judge could order defense counsel to consult with advisory counsel appointed by the court. If these suggestions fail, the judge could replace counsel, provided that the defendant's consent is obtained.

Once trial has commenced, intervention must be tailored carefully to avoid an adverse impact on the jury. The trial judge might decide to raise his questions with counsel at a sidebar conference or in chambers. Signals that counsel is un-

prepared may lead the judge to call a recess, admonish counsel, and permit additional time for preparation. While the trial judge cannot be expected to assume counsel's role, when he perceives that defense counsel has committed a major default jeopardizing the fairness and accuracy of the proceedings, he is obliged to take some action. Indeed, as I noted during my tenure as a district judge: "[I]t is impossible to consider seriously the vital elements of a fair trial without concluding that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice." His gentle proddings may cause the correction of errors. Ultimately, of course, if the attorney's incompetence is so severe that a fair trial is not possible, the trial judge could consider the propriety of inviting a motion for a mistrial by the defendant or ordering a new trial if the jury reaches a verdict of guilty.

Penetrating supervision

More penetrating judicial supervision must be combined with other measures if we are to make a meaningful contribution to the efforts to upgrade competence. We must not forget that between 60 and 90 per cent of criminal convictions are the result of guilty pleas and, therefore, never reach trial. In these cases the trial judge's ability to perceive the efforts and talents of defense counsel is necessarily limited. More important, the problems with some lawyers in the criminal defense bar begin long before anyone enters a courtroom. The legal profession as a whole unfortunately tends to denigrate those who represent criminal defendants. This attitude, combined with the frequently poor financial rewards of criminal practice and the ethical dilemmas involved in representing many guilty people, have made it difficult to attract the very best young lawyers to the criminal defense bar.

A careful examination of these structural characteristics of the criminal justice system, the ethical milieu in which criminal attorneys operate, and the training received by incipient defense lawyers in law schools indicates that sweeping changes must be made if we are to get to the root of the problem of incompetent defense attorneys.

One important criticism aimed at the defense bar is that inadequate representation is the result of an excessive number of cases undertaken by some lawyers. Defense counsel often have too little time and too few resources to undertake substantial investigation and research. A study by the National Legal Aid and Defender Association indicates that in jurisdictions with public defenders, at least 45 per cent of the full-time attorneys had misdemeanor caseloads that exceeded the maximum effective caseload per attorney, and 30 per cent had felony caseloads that exceeded the maximum effective felony caseload per attorney. The financial reward structure established by the Criminal Justice Act of 1971 tends to exacerbate this problem. Attorneys assigned to represent indigent

defendants are paid $20 per hour for time spent out of court and $30 per hour for court appearances, creating financial incentives for lawyers to maximize their time in court by agreeing to represent more defendants. The fee schedule also sends the wrong message by providing inadequate compensation for the essential, indeed primary, task of pretrial preparation.

Caseload pressures affect the quality of representation in numerous ways. A lawyer handling an excessive number of cases may not have the time to do more than review a brief file when his case is called for trial. The negotiation process prior to a decision to plead guilty, for example, requires considerable preparation, legal research, and a thoughtful analysis of alternatives if counsel is to be more than a paper shuffler who "moves the business" and persuades his clients to plead guilty. Measures should be taken to mitigate the pressures of excessive caseloads on defense attorneys.

Defense lawyers also need more investigatory assistance during the all-important pretrial preparation stage. The Criminal Justice Act does provide funds for public defenders and court-appointed attorneys to hire special investigators. The act's administrative and other constraints, however, prevent many lawyers from taking full advantage of this opportunity. Adequate funding of institutional investigatory staffs and paralegals for public defender organizations and nonprofit defense clinics could help ensure adequate pretrial preparation. Or the courts could adopt a program similar to the innovative project of the District of Columbia public defenders, which uses local law school students as "investigators" in exchange for academic credit.

While increased support personnel may help, they will not solve the problem if there are too few competent attorneys for indigent criminal defendants. Some commentators have suggested that the legal profession shoulder much of the burden of assuring adequate assistance for needy criminal defendants by adopting a system of compulsory *pro bono publico* service. Although not limited to criminal justice participation, this proposal, it is argued, might generate increased representation for indigent criminal defendants. While I agree that the organized bar has a responsibility to help provide legal counsel, a requirement for *pro bono* work is not the appropriate cure. It will not enhance the prestige of criminal defense work or ultimately remedy the shortage of defense lawyers. In sum, it is a band-aid solution to a deep-seated problem.

Ill-prepared law graduates

The problem of incompetent counsel goes beyond mere numbers. My experience in the United States attorney's office and as a judge leads me to conclude that young lawyers are not prepared at law school to confront the delicate ethical dilemmas facing the criminal practitioner. In pretrial conferences, for example, a lawyer must counsel his client concerning methods for presenting the most effective testimony. The line between the presentation and distortion

of evidence, however, is occasionally difficult to draw. At trial, the criminal lawyer must grapple with the vexing problem of reconciling his duty to render zealous assistance to his client with his duty to ensure that a fraud is not perpetrated on the court.

In addition to walking the fine line between passive subornation of perjury and advocacy, the criminal defense attorney often must undertake other difficult tasks, such as attacking on cross-examination a witness he knows to be truthful. Resolving these competing values in the context of a specific case is most difficult. While providing answers to specific ethical problems is beyond the scope of this article, I would like to emphasize that they are relevant to the question of lawyer competence. We cannot hope to improve competence if counsel are to remain adrift in a morass of ethical ambiguity.

These observations lead me to conclude that the twin aspects of the competency problem—actual incompetence and ethical myopia—have their roots in the American system of legal education. While law schools have stressed conceptual skills, they have placed insufficient emphasis on the practical training in litigation techniques and ethical sensitivity necessary to turn out competent trial lawyers.

The library or casebook is not the ward where the law's patients seek their remedies. Law students often are fully versed in legal doctrine, but too frequently they lack an appreciation of the importance of the facts. Experienced trial lawyers know, however, that a case can often be won through a compelling presentation of the facts. Advocacy is the art of persuasion, not merely memorization or logical deduction. It seems, therefore, that the concept of legal education in some of our teaching institutions is deeply flawed.

I believe the solution lies in returning to the historic traditions of legal education in criminal law. Before the rise of the modern law school, lawyers were trained by observing their elders at work in law offices and in the courtroom, and they took their first halting steps as advocates under the trained eye of seasoned practitioners much as a neophyte doctor learns under the supervision of an experienced surgeon.

The English long have recognized the importance of "on-the-job" training. Following three years of traditional legal training, those who intend to become barristers must serve a pupilage of no less than one year. The relationship between a barrister and his pupil is much like the association of an American judge and his law clerk, during which time the clerk secures a year or two of intense training in a one-to-one, teacher-student relationship. I believe a shift to a system of legal education in which an integral part of the training is an intern or residency program would improve significantly the quality of advocacy. Not only would this type of program serve the pedagogical purpose of enabling incipient lawyers to obtain advocacy skills by closely observing and working with those who have experience, but it also would provide an opportunity for developing ethical sensibilities.

What's happening to trial lawyers? It appears that fewer law students today are interested in the noncorporate aspects of law, and even those few are not entering criminal justice practice.

Law schools should consider the possibility of developing mini-internship programs in a number of substantive areas of the law. One possible reform would be to rotate students through a number of areas during the third year of law school under the guidance of practitioners. This approach might resemble the medical school model in which students circulate through practical training periods in fields such as surgery, internal medicine, and psychiatry. Law students who choose to work with criminal defense practitioners, for example, could assist in interviewing witnesses, preparing them for trial, and doing legal research. This would not only give these students important and useful training, but also would help counsel prepare their cases.

A number of law schools now have programs where students work in public defenders' offices and legal aid clinics. These efforts can be expanded to include greater numbers of law school students and recent graduates. Participants would be rewarded not only by the training and experience they receive but also through the knowledge that they are helping improve the quality of legal services to persons who might otherwise be represented inadequately. Ideally this will imbue in recent graduates a sense of commitment and social obligation, which would encourage them to continue working to improve the criminal justice system. An additional possible consequence would be a greater appreciation in the profession itself for the important contribution of these lawyers and enhancement of their stature with their colleagues at the bar.

Attract the best students

Regardless of the success of curricular reform, we must continue to emphasize society's interest in an adequate supply of competent trial lawyers. Although statistics are hard to come by, it appears that fewer students today are interested in noncorporate aspects of law than in the past. Of those who are, it seems that most gravitate to practices focusing on areas such as environmental law, consumer law, and civil rights law. While it may be easier for an attorney in these fields to like his work and his client, the criminal justice system would lose a great deal if it could not attract some of the best students.

The law schools and those of us on the bench and at the bar who are committed to reform the system should continue to teach that lawyers who represent unpopular clients are serving the public interest in maintaining a fair and workable adversary system. They deserve our respect. Through continued efforts, the dream of competent counsel for all members of society may yet become a reality.

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